No. 20-2206

IN THE

Supreme Court of the State of Ohiowa

LOUIS TULLY,

Petitioner,

v.

ZUUL ENTERPRISES,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OHIOWA SEVENTH APPELLATE DISTRICT, DRUMMOND COUNTY

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1) Did the appellate court err in affirming Zuul's motion for summary judgment on the manufacturing defect claim, when a genuine issue of material fact remained as to whether Zuul could be liable for L.T's injuries?
2) Does the read and heed doctrine apply to strict liability failure-to-warn claims in the state of Ohiowa when a manufacturer, Zuul, conceals a warning on its e-cigarette with "skins" that reflect popular cartoons and a minor child burns himself while playing with the e-cigarette?

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STATEMENT OF THE CASE

Respondent, Zuul Enterprises ("Zuul") is an e-cigarette company that was established in Cincinnatus, Ohiowa. R at 3. Zuul manufactures and produces e-cigarettes that are popular among teens and young adults. R at 4. The e-cigarette is operated by depressing a button on the device, which allows an atomizer within the device to heat up the flavored liquid in the cartridge. R at 4. The user can then choose to inhale the vapor through the device's mouthpiece. R at 4.

Zuul's Marketing to Children

In December 2017, a federal district court held that Zuul was using sweet vapor flavors to directly market its e-cigarettes to children. R at 4. As a result of this litigation, Zuul was forced to pay damages and an injunction was issued against the production of the sweet e-cigarette flavors. R at 4. Because Zuul stopped marketing its products to children, its stock price plummeted and the struggled to avoid bankruptcy. R at 4. In June 2018, Zuul issued a statement denying any attempts to market its products to children. R at 4. It vowed to only produce tobacco flavored vapor, which in fact was essentially required through the previous injunction. R at 4. Zuul also redesigned their e-cigarettes to prohibit users from inserting cartridges made by other companies. R at 4.

In the same statement, Zuul introduced new accessories called "Zuul skins." R at 4. Zuul skins are adhesive labels that affix to the surface of any Zuul e-cigarette. R at 4. Users can customize the appearance of the skins, or purchase skins pre-decorated with patterns or cartoon characters. R at 4. Within a month after the introduction of the Zuul skins, Zuul's stock prices returned to their former heights. R at 4. While each Zuul e-cigarette has a warning on its packaging, the "skins" contain no additional warning regarding the dangers of the product they enclose. R at 4.

The Night of L.T.'s Injury

Petitioners, Louis and Janine Tully ("the Tully's") often entrusted their eleven-year-old child, L.T., to the care of Dana Barrett ("Ms. Barrett"), a nineteen-year-old. Ms. Barrett has been a frequent user of e-cigarettes since she matriculated. R at 5. As a fan of the cartoon character, *Hola Gato*, she purchased a skin depicting this character on her e-cigarette. R at 5. L.T. is also a fan of the cartoon character, *Hola Gato*. R at 5.

On July 17 2018, Ms. Barrett arrived at the Tully's house. R at 5. She brought the e-cigarette, encased in its new *Hola Gato* skin. R at 5. Ms. Barrett had warned L.T. it was dangerous to play with the e-cigarette. R at 5. At some point in the evening, L.T. procured the e-cigarette and depressed the activating button to mimick the operation of a leaf blower. R at 5. Without warning, the e-cigarette exploded. R at 5. As a result of this incident, L.T.'s hand was severely burned. R at 5.

Procedural History

On behalf of L.T., the Tully's sued Zuul under state law. R at 2. The complaint alleged that (1) Zuul had violated state product liability law due to a manufacturing defect that caused the explosion, and (2) Zuul failed to adequately warn consumers of the risks associated with their product. R at 2. Zuul moved for summary judgment, contending that (1) although the product did suffer from a manufacturing defect, liability could not be established, because L.T. was not a foreseeable user of the product, and (2) the warning provided on the packaging of the product sufficiently fulfilled Zuul's duty to warn users. R at 2-3.

The Court of Common Pleas held that children were not foreseeable users of the Zuul products and granted summary judgment to Zuul on the manufacturing defect claim. R at 3. The warning claim proceeded to trial. R at 3. At trial, the Tullys requested a jury instruction on the

heeding presumption. R at 3. Zuul objected, and the trial court sustained the objection. R at 3. The jury held for Zuul, and the Tullys timely appealed. R at 3.

The Tullys appealed the results on two grounds. R at 3. They argued that the trial court's grant of summary judgment was inappropriate, as an issue of material fact remained as to whether Zuul could foresee a child as a consumer of its product and thus should be liable for any product defect. R at 3. Additionally, the Tullys argued that the trial court erred in failing to allow a jury instruction on the heeding presumption. R at 3.

The appellate court affirmed the trial court's decision on both issues. R at 6. The court affirmed the trial court's motion for summary judgment in favor of Zuul on the manufacturing defect claim. R at 8. Expert testimony revealed there was a defective condition in the e-cigarette, and the defect caused the harm. R at 8. However, the court held that Zuul should not be held liable for the injury to L.T. because L.T. was not a foreseeable consumer of its product. R at 8. Therefore, it was not foreseeable that L.T. could be subject to the harm caused by the defective condition. R at 8. On the second issue, the court concluded that although the trial court abused its discretion in denying plaintiff's jury instruction, no prejudice resulted from this error. R at 12.

SUMMARY OF THE ARGUMENT

This Court should reverse the appellate court's decision for two reasons. First, the appellate court erred in affirming Zuul's motion for summary judgment on the manufacturing defect claim. Second, the court erred in finding that a failure to provide any jury instruction regarding the read and heed doctrine did not result in any prejudice.

The appellate court erred in affirming Zuul's motion for summary judgment on the manufacturing defect claim because a genuine issue of material fact remained. In its decision, the appellate court relied on the untenable argument that a child cannot be within the class of persons that could be subject to harm from Zuul's defective product, and thus, liability is not appropriate.

By excluding a child from protection of strict liability, the court blatantly ignored the basic principles underlying the ancient doctrine of strict products liability. However, a question of fact remained as to whether L.T. was a foreseeable consumer of its product and thus, whether Zuul could be liable for his injuries.

Zuul should be liable for L.T.'s injuries. He was a consumer in the class of persons that Zuul should have reasonably foreseen could be harmed by its defective product. L.T. was a consumer because he used the product as intended. By using the product as intended, Zuul should have reasonably foreseen harm resulting from intended use of its defective product. Additionally, to find that L.T. is not a foreseeable consumer and is barred from liability would frustrate the policy considerations underlying strict products liability. These policy considerations would not allow a court to exclude a class of persons, especially children, from having protection from defective products. Thus, under the fact-based analysis and the policy-based analysis, L.T. is a foreseeable consumer and Zuul should be liable for L.T.'s injuries. Because a genuine issue of material fact remains as to whether Zuul is liable for L.T.'s injuries, summary judgment was not appropriate.

Moreover, while the appellate court was correct in finding that the state of Ohiowa should adopt the read and heed doctrine in strict liability failure-to-warn claims, the court erred in finding that a failure to provide any jury instruction regarding the read and heed doctrine did not result in any prejudice. The read and heed doctrine, also referred to as the "heeding presumption," creates a presumption in favor of the plaintiff in strict liability claims where the manufacturers fail to provide a warning on their product or provide an inadequate warning. First and foremost, Ohiowa should adopt this heeding presumption because it furthers the state's public policy of protecting consumers. Several jurisdictions have all adopted the heeding presumption. In all of the

jurisdictions that have adopted or used the heeding presumption, the courts relied on two rationales to justify use of the presumption. These rationales are: (1) the heeding presumption furthers the public policy goal of products liability law, which is to protect users from dangerous products and (2) language from the Restatement (Second) of Torts § 402A comment j (1965). Traditionally, Ohiowa has relied on the Restatement (Second) of Torts § 402A when developing its product liability law. While comment j of the Restatement (Second) of Torts § 402A has received widespread criticism for being an illogical basis for the heeding presumption, public policy rationales that justify use of the heeding presumption far outweigh any issues that stem from the language of comment j because this presumption works to protect the consumer and it encourages manufacturers to make safe products and fulfill their duty to warn users of any potential dangers.

Thus, the heeding presumption should be adopted in Ohiowa because doing so would comply with several jurisdictions throughout the United States, including those that were most influential on Ohiowa products liability law, Ohiowa has traditionally relied on the Restatement (Second) of Torts, and adopting the heeding presumption would ensure products liability law in Ohiowa continues to protect the consumer and look favorably upon the plaintiff.

Since Ohiowa should adopt the heeding presumption, the trial court's rejection of the heeding presumption jury instruction was an abuse of discretion that resulted in prejudice. The heeding presumption has the effect of lightening the plaintiff's burden of proof on the causation element of a strict liability failure-to-warn claim. Thus, the court's failure to provide the jury with this presumption created grounds for prejudice because the jury was not informed of this change in causation which is favorable to the petitioner.

For these reasons, this Court should reverse the appellate court's holding.

ARGUMENT

An injured individual who has fallen victim to a manufacturer's harmful or defective product must have a right to protection in the eyes of the law. Moreover, the manufacturers must abide by a duty-to-warn and protect potential consumers of its products. Especially when the manufacturer marks the product safe for consumption and undertakes the responsibility of supplying products to the public. Restatement (Second) of Torts § 402A. Accordingly, manufacturers must be held accountable for defective products to ensure the safety of the public.

The doctrine of strict products liability makes the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. Restatement (Second) of Torts § 402A (1965). This doctrine acts as a safeguard to victims of harmful or defective products who are powerless to protect themselves. *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897, 901 (1963). It provides manufacturers a strong incentive to design, manufacture, and distribute safe products. *Perkins v. Wilkinson Sword Co.*, 700 N.E.2d 1247, 1252 (Ohio 1998).

Under strict liability, manufacturers have a duty to make a product reasonably fit for its intended use. *Winnett v. Winnett*, 310 N.E.2d 1, 3 (Ill. 1974). This duty extends to foreseeable uses of a product. *Smith v. Cent. Mine Equip. Co.*, 876 F. Supp. 2d 1261, 1269 (W.D. Okla. 2012), *aff'd,* 559 F. App'x 679 (10th Cir. 2014). This doctrine applies with even more force when aimed at protecting children. *Perkins*, 700 N.E.2d at 1252. What *strict* liability means is that a manufacturer should, in most cases, be held liable for foreseeable uses of its defective product. *Smith*, 876 F. Supp. 2d at 1269 (emphasis added). Which, in retrospect, almost nothing is entirely unforeseeable. *Winnett*, 310 N.E.2d at 3.

Ohiowa seemed to adopt this view by heavily relying on the Restatement (Second) of Torts 402A, as well as the Sixth, Seventh, and Tenth Circuit Courts of Appeal for guidance in drafting

the OPLA. R at 6. In fact, some of these circuits have broadly allowed consumers to recover in cases where their injuries have resulted from a product that is defective. *See Smith*, 876 F. Supp. 2d at 1269 (evaluating liability by looking to whether the consumer used the product in an intended or foreseeable manner); *Bourne v. Marty Gilman, Inc.*, No. 1:03-CV-1375-DFH-VSS, 2005 WL 1703201, at *4 (S.D. Ind. July 20, 2005), *aff'd,*452 F.3d 632 (7th Cir. 2006) (extending liability to "any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.").

Furthermore, the heeding presumption works to protect users from using products that fail to warn users of any danger that can stem from using a product. This presumption furthers the goal of products liability law in both Ohiowa and the United States by ensuring manufacturers fulfill their duty to warn which protects the American consumer. *Coffman v. Keene Corp.*, 628 A.2d 710, 718 (N.J. 1993). While this presumption has been criticized, sparking heavily debate by legal scholars, courts, and even the media. *See* Kevin J. O'Connor, *New Jersey's Heeding Presumption in Failure to Warn Product Liability Actions: Coffman v. Keene Corp. and Theer v. Philip Carey Co.*, 47 Rutgers L. Rev. 343, 351 (1994). Any criticism over the heeding presumption is second to the positive impact the heeding presumption has on the American public.

The heeding presumption was first referenced in the United States by the Texas Supreme Court in 1972 and was officially adopted by the state a few years later. *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972). Since the presumption's first mention in 1972, it has been adopted and used by several jurisdictions throughout the United States. Specifically, seventeen states have adopted the heeding presumption and nine out of the thirteen federal circuits have used the presumption in strict liability failure-to-warn disputes.

There are two rationales courts rely on when adopting the heeding presumption. These rationales are: (1) the heeding presumption furthers the public policy goal of products liability law, which is to protect users from dangerous products and (2) language from the Restatement (Second) of Torts § 402A comment j (1965), which encourages manufacturers to provide warnings on their products, allows for courts to infer a presumption that benefits plaintiffs because it relieves plaintiffs from the burden of proof of showing causation in situations where a manufacturer fails to provide the user with a warning or provides an inadequate warning. Both public policy and language from the Restatement (Second) of Torts affirm that Ohiowa should adopt the heeding presumption because Ohiowa has relied on the Restatement (Second) of Torts in the past in deciding issues regarding products liability law and the heeding presumption furthers the tradition of product liability law in Ohiowa favoring the consumer.

Below, it is established that: (1) the appellate court erred in affirming the motion for summary judgment on the manufacturing defect claim because a genuine issue of material fact remained as to whether Zuul should be liable for L.T's harm caused by its defective product; and (2) even though the appellate court was correct in finding Ohiowa should adopt the read and head doctrine, the court erred in finding that a failure to provide any jury instruction regarding the read and heed doctrine did not result in any prejudice. For these reasons, this Court should reverse the appellate court's holding.

I. THE APPELLATE COURT ERRED IN AFFIRMING ZUUL'S MOTION FOR SUMMARY JUDGMENT BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER ZUUL IS LIABLE FOR L.T'S INJURIES.

The appellate court's decision to grant Zuul's motion for summary judgment was improper because an issue of material fact exists as to whether L.T was a foreseeable consumer of the e-cigarette, and thus whether Zuul is liable for his injuries. Summary judgment is only

appropriate when there is no genuine issue as to any material fact of the claim, and the moving party is entitled to judgment as a matter of law. Ohiowa R. Civ. Pro. 56(a). A decision for summary judgment is reviewed de novo, construing the evidence in a light most favorable to the nonmoving party. *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 362 (Iowa 2014). The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

In Ohiowa, a product is in a defective condition if, at the time it was conveyed by the seller to another party, "it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer." Ohiowa Rev. Code § 5552.369(a)(1). This is a rule of *strict* liability, making the manufacturer subject to liability to the consumer even though he has exercised all possible care. Restatement (Second) of Torts § 402A (emphasis added). The expert witness testified that were it not for the defective condition, the e-cigarette would have operated in accordance with Zuul's specifications and would have functioned like any other e-cigarette on the market. R at 8. In addition, Zuul does not dispute the fact that the e-cigarette was in a defective condition as a result of the manufacturing defect. R at 8. Thus, there is no dispute that the e-cigarette is defective, and was the proximate cause of L.T's injuries.

Strict liability is appropriately placed on the manufacturer for such a defect if the plaintiff is a person entitled to the protections afforded by the concepts of strict-tort-liability. *Winnett*, 310 N.E.2d at 3. Thus, a person is entitled to such protections if: (1) "the product is expected to and does reach the consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article"; and (2) "that consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by

the defect or defective condition." Ohiowa Rev. Code § 5552.368. Because Zuul did not offer any evidence that the e-cigarette had been altered, the first prong is met. Thus, for Zuul to be liable, L.T. must establish that he is a consumer in the class of persons that Zuul should have reasonably foreseen as being subject to the harm caused by the defective e-cigarette. If this is established, then the Zuul is a foreseeable consumer under the OPLA and Zuul is liable.

The OPLA fails to define "consumer." Nevertheless, the OPLA heavily relied on the Restatement (Second) of Torts Section 402A, and the Sixth, Seventh, and Tenth Circuit Courts of Appeal. R at 6. Thus, the court can look to these jurisdictions and the Restatement for guidance. Accordingly, the Restatement provides that for a person to be a consumer, it is only necessary that the person ultimately used the product as intended. Restatement (Second) of Torts § 402A. Like a domino effect, if the consumer uses the defective product as intended, the manufacturer should have reasonably foreseen the consumer as being subject to the harm caused by the device. *Smith*, 876 F. Supp. 2d at 1269.

Below, L.T. establishes that Zuul must be liable for his injuries because: (1) L.T. was a foreseeable consumer of the defective e-cigarette, and thus, his harm was foreseeable; and (2) the policy considerations underlying strict products liability would not tolerate an alternative conclusion. Thus, the Appellate Court erred in affirming Zuul's motion for summary judgment on the Tully's manufacturing defect claim because there are genuine issues of fact as to whether L.T. was a foreseeable consumer of its product and therefore, whether Zuul is liable for his injuries.

A. L.T. was a Foreseeable Consumer Because he Used the E-cigarette as Intended, and Thus Zuul Should Have Reasonably Foreseen his Harm

For a person to be a consumer, it is only necessary that the person ultimately used the product as intended. Restatement (Second) of Torts § 402A. It is not necessary that the consumer

purchase the product or acquire it directly from the seller. *Phelps v. Sherwood Med. Indus.*, 836 F.2d 296, 301 (7th Cir. 1987) (citing Restatement (Second) of Torts § 402A (1965)).

Courts have viewed a product's intended use through an expansive lens. *See Gean v. Cling Surface Co.*, 971 F.2d 642, 645 (11th Cir. 1992) ("[a] use is 'intended' if it is one that the manufacturer could reasonably foresee."); *Sutherland v. Elpower Corp.*, 923 F.2d 1285, 1289 (8th Cir. 1991) (explaining that Missouri courts typically use a product's intended uses interchangeably with reasonably foreseeable uses); *Noel v. S. S. Kresge Co.*, 669 F.2d 1150, 1156 (6th Cir. 1982). The court should not focus on the purpose the product serves, but instead on how the product is intended to be used. For example, courts have held that a window screen is intended to be placed in a window, and a headfirst belly slide is an intended use of a pool slide. *Lamkin v. Towner*, 563 N.E.2d 449, 458 (1990); *Kriz v. Schum*, 549 N.E.2d 1155, 1160 (1989). Moreover, a manufacturer cannot escape liability of harm caused by its defective product by narrowly construing the product's intended use. *Noel*, 669 F.2d at 1156 (noting that "a manufacturer or seller may not determine the 'intended use' of a product and then escape liability for injury resulting from a different use even though the product is defective and the use by the consumer is foreseeable.").

Here, L.T. is a consumer because he used the e-cigarette as intended. He held the device in his hand and depressed the activating button. R at 5. This is how Zuul intended the product to be used. R at 4. It is not necessary that L.T. have a purpose of inhaling or smoking the product. He used the e-cigarette in manner that any other user of the device would use it. Zuul cannot escape liability by determining a single intended use for the e-cigarette that departs from other reasonably foreseeable or intended uses. Thus, because L.T. used the e-cigarette as it was intended to be used, he is a consumer under the OPLA.

A manufacturer should foresee that its product will be used as intended. *See Kriz v. Schum*, 549 N.E.2d 1155, 1160 (1989); *but see Swift v. Serv. Chem., Inc.*, 310 P.3d 1127, 1132 (Okla. Civ. App. 2016) (explaining that harm resulting from a person playing with technical grade chemicals made for industrial use was not foreseeable because such use was not intended). Thus, it can be inferred that harm resulting from a product's intended use is foreseeable when said product is defective. *Smith*, 876 F. Supp. 2d at 1269; *Noel*, 669 F.2d at 1156 (explaining that a manufacturer must not escape liability if the device is defective and the product's use is foreseeable). In retrospect almost nothing is entirely unforeseeable. *Winnett*, 310 N.E.2d at 5. Moreover, foreseeable harm generally relies on an objective view. *Smith*, 876 F. Supp. 2d at 1269; *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661, 670 (Ohio 1995). That is, a manufacturer need not anticipate the injury of the *particular* person, but rather that a product's defective condition "was likely to result in injury to someone." *Id.* (emphasis added).

In *Smith v. Central Mine Equipment*, a drill rig operator brought a products liability claim against a manufacturer after falling while operating the drill, resulting in an injury. 876 F. Supp. 2d at 1269. The court acknowledged that the defendant was the manufacturer and the plaintiff was among the class of its intended and foreseeable users. *Id.* Based on the potentially dangerous design of the drill, the court added that a reasonable juror could conclude that such a result of harm could occur while the drill is being operated as intended. *Id.* Ultimately, the court held that the plaintiff's submissions supported an inference that the manufacturer should have reasonably foreseen the type of injuries the plaintiff suffered. *Id.*

Here, Zuul should foresee the intended uses of its e-cigarette. This includes the depression of the button on the device. R at 4. Because the device was defective, it can be reasonably inferred that L.T's harm was foreseeable because he was using it as intended.

Nevertheless, it is not necessary that L.T.'s particular harm was foreseen. From an objective view, any person attempting to use the e-cigarette as intended or in a reasonably foreseeable manner could have been injured. The e-cigarette's defect, which was the faulty connection in the e-cigarette, happened because the button on the device was pressed. R at 7-8. The button being pressed was the e-cigarette's intended use. R at 3. Hence, the defect was the proximate cause of L.T's injury. R at 6. Zuul should have reasonably foreseen that any person pressing the button on the e-cigarette could be subject to the harm caused by the defective condition. As in *Smith*, the e-cigarette's defect could lead a reasonable person to infer that Zuul should have reasonably foreseen L.T.'s injuries as a result of the e-cigarette's defective condition. Because L.T. used the product as intended, he is a foreseeable consumer under the OPLA.

Accordingly, because L.T. is a foreseeable consumer of the defective e-cigarette, Zuul is liable for L.T.'s injuries. Thus, a genuine issue of material fact remains, and the Appellate Court erred in affirming Zuul's motion for summary judgment.

B. Even if the Court is not Swayed by the Fact-based Analysis, the Court Should Still Consider L.T. as a Foreseeable Consumer Because an Alternative Finding Would Frustrate the Policy Purposes of Strict Products Liability.

The principal objective in the ancient rule of strict liability is to promote the safety of the public through ensuring safe products. *Perkins*, 700 N.E.2d at 1252. The public's interest in human life and safety can best be protected by subjecting manufacturers of defective products to strict liability when their products cause harm. *Leichtamer v. Am. Motors Corp.*, 424 N.E.2d 568, 575 (Ohio 1981). The manufacturer, by marking its product safe for consumption, owes a special responsibility towards the public who may be injured by it. Restatement (Second) of Torts § 402A. By using these products, consumers put their trust in these manufacturers and expect them to stand behind their goods. *Id.*

In light of these policy considerations, strict liability has been stretched far beyond its textual boundaries to ensure protection to consumers. For example, many courts have extended strict liability to bystanders who were injured by defective products. *Bourne*, No. 1:03-CV-1375-DFH-VSS2000 at *4 (extending liability to "any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use."); *Moning v. Alfono*, 254 N.W.2d 759, 762 (Mich. 1977) (holding that a manufacturer owes a "legal obligation of due care to a bystander affected by use of the product."). In *Piercefield v. Remington Arms*, a products liability claim was brought against a gun manufacturer after a defective shotgun shell exploded and injured innocent bystanders. 133 N.W.2d 129, 130 (Mich. 1965). The court held that it was foreseeable that a defective shell would cause a shotgun barrel to explode and injure persons standing nearby, and that recovery against the manufacturer of the shell was appropriate. *Id.*

The protections underlying products liability apply with even more force when it comes to the protection of children. *Perkins*, 700 N.E.2d at 1252. In fact, children have recovered from defective product injuries even when a child is not an intended user of the product. *Id.* In *Perkins v. Wilkinson Sword Co.*, a products liability claim was brought against a manufacturer of disposable lighters after a child died from playing with a lighter. *Id.* The manufacturer argued that it cannot be held liable because cigarette lighters are intended to be utilized by adults and not children. *Id.* However, the court rejected this argument in light of public policy considerations and found in favor of the plaintiff. *Id.* The court contended that strict liability should be imposed to promote safe products and consumer protection, especially when children are harmed by the defective product. *Id*.

While some argue children lack common knowledge of the danger of consumer products, *see Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1408 (7th Cir. 1994), a manufacturer cannot avoid liability on the ground that the child "should have known better." *Kirk v. Hanes Corp. of N. Carolina*, 16 F.3d 705, 710 (6th Cir. 1994). Especially when such use is foreseeable by the manufacturer. Others argue that the liability of a child that is injured from a defective device should fall on the responsibility of the parent or caregiver. *See Curtis Through Curtis v. Universal Match Corp.*, 778 F. Supp. 1421, 1430 (E.D. Tenn. 1991). However, this should not be the case when the device is marketed towards children. *Kirk*, 16 F.3d at 710.

In fact, when the device is marketed towards children, a manufacturer should reasonably foresee and expect that a child will use it. *Id.* Moreover, even when the product is marketed to adults, some courts have extended liability to children if such use is foreseeable. *Todd*, 21 F.3d at 1408 (explaining that "it is foreseeable that a child might use a lighter."); *Perkins*, 700 N.E.2d at 1251 (explaining that "lighters are commonly used and kept around the home, and it is reasonably foreseeable that children would have access to them and attempt to use them.").

An injured child who fell victim to a defective product must have a right to protection in the eyes of the law. With such an emphasis on consumer protection, excluding an entire class of persons from liability based on an arbitrary consideration is unjustified by the historical underpinnings of strict products liability. In the instant matter, L.T. was more than just a bystander; he held the e-cigarette in his hand and used it as intended. As in *Piercefield*, if an innocent bystander can receive protection from injury by a defective product, L.T. has even more of a reason for protection. The court must not strip away this protection simply because of a victim's age. In fact, Zuul was fully aware that its product appealed to the younger generation. R at 4. Zuul was known for directly marketing its e-cigarettes to children. R at 4. Zuul was given a

chance to redeem itself by making its products safer and redesigning its devices. R at 4. Instead, Zuul had its own interests in mind by selling these e-cigarettes with labels of children's cartoon characters. R at 4.

Like the lighter in *Perkins*, a child such as L.T. attempting to use an e-cigarette is not so unforeseen as to warrant taking the case from the jury. Especially when the e-cigarette is masked with a skin of his favorite cartoon character. Lighters are indeed dangerous, especially to children. These are things that a child should and usually does know. But this was not a child acting naïve and putting himself in danger due to carelessness. This is a situation where a manufacturing defect caused harm to a person who was using the product in a manner that its manufacturer expects it to be used. The ancient doctrine of strict products liability would fasten liability on Zuul. Thus, the appellate court erred in affirming the summary judgment in favor of Zuul, as a genuine issue of material fact remains.

II. The Read and Heed Doctrine Should Apply to Strict Liability Failure-to-Warn Claims in Ohiowa

The appellate court's decision should also be reversed because failure to provide a jury instruction regarding the read and heed doctrine does result in prejudice. While the Appellate Court was correct in finding that the read and heed doctrine does apply to strict liability failure-to-warn claims in the state of Ohiowa, the lower court's decision should be reversed because failure to provide a jury instruction regarding the heeding presumption does result in prejudice because it prevented the jury from presuming the fact that Zuul's failure to provide an adequate warning meant L.T.'s burden of proof causation significantly lightened. *See Coffman*, 628 A. 2d at 717.

Under products liability law the read and heed doctrine, often referred to as the "heeding presumption," operates on a presumption that "if a product comes with a warning, the user will read and heed the warning." Carrie Daniel, *Guide to Defeating the Heeding Presumption in*

Failure-to-Warn Cases, 70 Def. Couns. J. 250 (2003). Specifically, the "heeding presumption" comes from the language of the Restatement, which states: "[w]here warning is given, the seller may reasonably assume it will be read and heeded. . . ." Restatement (Second) of Torts § 402A cmt. j.

Initially, this rebuttable presumption benefits the manufacturer in situations where the manufacturer provides an adequate warning because there is the presumption that had the user read and followed the warning the danger of the alleged product would have been avoided. *Id.* However, in situations where the manufacturer fails to provide the user with a warning, this presumption "works in favor of the plaintiff because causation is presumed" which allows the fact-finder to presume the plaintiff would have read and heeded an adequate warning had the manufacturer provided one. *Id.*

Most jurisdictions have applied this presumption in the manner most favorable to the plaintiff. *Knowlton v. Desert Medical, Inc*. 930 F. 2d 116, 123 (1st Cir. 1991); *Plummer v. Lederle Laboratories*, 819 F. 2d 349, 355-56 (2d Cir.), *cert denied*, 484 U.S. 898 (1987); *Seley v. Searle & Co.*, 67 Ohio St. 2d 192, 423 N.E.2d 831, 838 (Ohio 1981). While this presumption works in favor of the plaintiff where the manufacturer fails to provide the user any warning, the defendant, or manufacturer, is given the opportunity to rebut this presumption by providing evidence that there was an adequate warning provided. *Miller v. Pfizer Inc.*, 196 F. Supp. 2d 1095, 1127 (D. Kan. 2002), *aff'd*, 356 F.3d 1326 (10th Cir. 2004).

While not all courts have chosen to recognize the heeding presumption, this presumption should be adopted in Ohiowa because it follows Ohiowa's custom of implementing products liability law favorably upon the consumer by relieving plaintiffs from having to prove the causation element of the claim in failure-to-warn situations. *Id.* Notably, several jurisdictions have

adopted the heeding presumption in situations where a manufacturer fails to provide an adequate warning. *See Bachtel v. TASER Intern., Inc.*, 747 F.3d 965 (8th Cir. 2014); *Drake v. Allergan, Inc*., Prod. Liab. Rep. (CCH) P 19500, 2014 WL 5587029 (D. Vt. 2014); *In re Fosamax Products Liability Litigation*, 924 F. Supp.2d 477 (S.D. N.Y. 2013); *Thom v. Bristol-Myers Squibb Co*., 353 F. 3d 848, 855 (10th Cir. 2003); *General Motors Corp. v. Saenz on Behalf of Saenz*, 873 S.W. 2d 353, 357 (Tex. 1993).

Traditionally, courts that have adopted the heeding presumption have used two justifications for adopting the heeding presumption. *Id.*at 353. The first of these justifications is public policy and the second is language from the Restatement (Second) of Torts § 402A, comment j (1965). Both public policy and the Restatement confirm the heeding presumption should be the law of the land in the state of Ohiowa. First, understanding the development of the heeding presumption throughout the United States emphasizes why Ohiowa should adopt the heeding presumption.

A. Development of the Heeding Presumption and its Adoption Throughout the United States Affirm that Ohiowa should Use This Presumption

In *Technical Chemical Co. v. Jacobs*, the court recognized the difficulty of proving causation in products liability cases, particularly in situations where the user dies and the fact-finder must rely on speculative evidence as to whether the user would have read and followed a warning. 480 S.W.2d at 606. The court interpreted comment j to recognize the rebuttable presumption that had a plaintiff read an adequate warning they would have heeded that warning. *Id.* This case has been cited by numerous jurisdictions following its decision. *See* Carrie Daniel, *supra* at 252. For example, in 1986 the Supreme Court of Texas referred to its *Technical Chemical Co*. decision when it officially adopted the heeding presumption in *Magro v. Ragsdale Brothers, Inc.*, a failure-to-warn claim where the plaintiff suffered injury to his hand while cleaning a

machine and the manufacturer failed to provide any instructions on how to operate the machine. 721 S.W. 2d 832, 834 (Tex. 1986).

Importantly, courts in the sixth, seventh, and tenth circuits have also all used the forms of the heeding presumption in strict liability failure-to-warn cases. Ohiowa relied heavily on the these three federal circuits when drafting its products liability statute, so the fact that these jurisdictions have all approved some form of the heeding presumption further proves this presumption should be adopted in Ohiowa.

Specifically, for the Sixth Circuit, in the *Hisrich v. Volvo Cars of North America, Inc*. the court upheld Ohio's adoption of the heeding presumption in a failure-to-warn case where the administrator of an estate of a six-year-old passenger who was killed by the deployment of a vehicle's airbag during a low-speed collision sued the manufacturer of the vehicle. 226 F. 3d 445, 448, 451 (6th Cir. 2000). While not a sixth circuit decision, the court in *Snawder v. Cohen*, a court located in the western district of Kentucky at Louisville, a district within the sixth circuit, which found that while the state of Kentucky had not formally adopted the heeding presumption, Kentucky had adopted § 402A of the Restatement of Torts (Second) and therefore the court assumed that Kentucky courts would follow the presumption. 749 F. Supp. 1473, 1479 (W.D. Ky 1990).

For the tenth circuit, in *Thom v. Bristol-Myers Squibb, Co*., the court referenced the heeding presumption in a case where the plaintiff was prescribed a drug by his physician and suffered permanent injury. 353 F.3d 848. While this particular case differs somewhat from the facts at hand because of the issues in proving causation that can arise when a physician prescribes a drug made by the manufacturer, this case still affirms that the tenth circuit has used the heeding presumption. *Id.*at 856.

Additionally, in *Daniel v. Ben Keith Co.*, the court found that Oklahoma had adopted the read and heed doctrine and affirmed that the structure and goal of the heeding presumption is consistent with the Oklahoma Evidence Code, and the court used the heeding presumption to find the defendant successfully rebutted the presumption. 97 F.3d 1329, 1332-33 (10th Cir. 1996); *see Clark v. Continental Tank Co.,* 744 P.2d 949, 954 (Okla.1987) (an Oklahoma supreme court decision that found the plaintiff was not entitled to the presumption when he admitted that a warning would not have alerted him to something); *see Cunningham v. Charles Pfizer & Co. Inc.,* 532 P.2d at 1382–83 (Okla. 1974) (another Oklahoma Supreme Court decision where defendant provided sufficient evidence to overcome presumption plaintiff would have heeded adequate warning about polio vaccine).

An important factor that the court discussed in *Daniel*, which is important when analyzing diversity tort cases in federal circuits, is that federal courts are legally bound to follow state law for certain issues arising in the dispute because tort law is generally reserved to the states, in *Daniel* the court was bound by the state law of Oklahoma in deciding the issue of whether the lower court erred in refusing to give a "heeding presumption" jury instruction. 97 F. 3d at 1332.

Finally, for the seventh circuit, in the Southern District of Illinois, a district within the seventh circuit, suggested that, while the Illinois Supreme Court has not officially adopted the heeding presumption, the Illinois Supreme Court would likely adopt the presumption because it would have the effect of "reliev[ing] a plaintiff of her burden of proving an important facet of causation" in a case where the plaintiff suffered injuries by taking a prescription drug. *Giles v. Wyeth, Inc.*, 500 F. Supp. 2d 1063, 1066, 1069 (2007). Additionally, in *Williams v. Genie Industries, Inc*. a court located Northern District of Indiana, South Bend, which is in the seventh circuit, the court stated that in strict liability actions in Indiana, "the law should provide a

presumption that an adequate warning would have been read and heeded, thereby minimizing the obvious problem of proof of causation." *Williams v. Genie Industries, Inc*., 2006 WL 1408412 (N.D. Ind. 2006). Clearly, there is significant jurisprudence in the three circuits Ohiowa relied on whendrafting its own products liability statute, and this strengthens the fact that adopting the heeding presumption furthers the goals of products liability law in Ohiowa and therefore should be adopted.

Along with these three federal jurisdictions, several other federal circuits have also adopted the heeding presumption. *See Ackermann v. Wyeth Pharmaceuticals*, 526 F.3d 203, 212 (5th Cir. 2008); *Waterhouse v. R.J. Reynolds Tobacco Co.*, 162 Fed. Appx. 231, 235 (4th Cir. 2006); *Pavlik v. Lane Ltd.'Tobacco Exporters Intern.*, 135 F. 3d 876, 883(3rd Cir. 1998). Additionally, outside of the federal circuits, several states have officially adopted some form of the heeding presumption. *House v. Armour of America, Inc*., 929 P.2d 340, 347 (Utah 1996); *Coffman*, 628 A.2d at 71; *Bushong v. Garman Co*., 843 S.W.2D 807, 811 (Ark. 1992). In sum, several federal circuits, including the three Ohiowa has relied on in forming product liability laws, plus several states all have adopted the heeding presumption affirming its rightful place in products liability law.

B. Public Policy and the Restatement (Second) of Torts § 402A Affirm the Read and Heed Doctrine Should Apply to Strict Liability Failure-to-Warn Cases in Ohiowa

When adopting the heeding presumption, courts rely on two justifications: (1) public policy and (2) the language from the Restatement (Second) of Torts § 402A Comment j. (1964). See *Coffman*, 628 A.2d at 717-18 (N.J. 1993). In terms of public policy, the argument relies largely in part that in most jurisdictions products liability law is used as a way to protect the consumer and the heeding presumption upholds this goal. *See Id.* at 718. In terms of the language from comment j of the Restatement (Second) of Torts § 402A justification, the logic generally goes that, even

though not explicitly written in comment j, if a manufacturer does not provide any warning or the warning is inadequate, then the fact-finder should have the presumption that had an adequate warning been given the user would have followed it. *See Id.*at 717. Both of these justifications are sufficient to find Ohiowa should adopt the heeding presumption, however public policy justifications are the strongest because there has been some substantial controversy over the comment j rationale.*See* Kevin J. O'Connor, *New Jersey's Heeding Presumption in Failure to Warn Product Liability Actions; Coffman v. Keene Corp. and Theer v. Philip Carey Co.*, 47 Rutgers L. Rev. 343, 359 (1994).

1. Ohiowa's Previous Reliance on The Restatement (Second) of Torts Supports the State's Adoption of the Heeding Presumption

While the state of Ohiowa has not adopted the Restatement (Second) of Torts in its entirety, the Ohiowa legislature relied on it when drafting products liability laws. R. at 11. In particular, the state of Ohio has adopted the "learned intermediary doctrine" which originates from the Restatement (Second) of Torts §402A cmt.j. Therefore, it follows that Ohiowa should adopt the heeding presumption which also stems from the Restatement (Second) of Torts § 402A cmt.j (1965), especially if adopting such presumption furthers Ohiowa's goal of favoring the consumer in products liability law.

Specifically, the language of comment j of the Restatement (Second) of Torts § 402A states: "in order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. . . . where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if followed, is not in defective condition, nor is it unreasonably dangerous. Restatement (Second) of Torts§ 402A cmt. j (1965). In developing the

heeding presumption, courts have interpreted this presumption as an extension of comment j which, based on the language, was drafted to create a presumption to benefit manufacturers. *See Technical Chemical Corp.*, 480 S.W.2d at 606. So, when a manufacturer provides an adequate warning, they will not be found liable because it is presumed the plaintiff would have read and heeded the warning. *Id.*

From this presumption benefiting the manufacturer, courts adopting the heeding presumption found it was a logical next step that a reverse presumption should be used when a manufacturer provides no warning or an inadequate warning, so in this case the presumption now benefits the plaintiff instead of the manufacturer. *Coffman*, 628 A.2d at 717.The rationale behind this reverse presumption is that if a manufacturer is entitled to such a presumption, then the plaintiff should also be entitled to such a presumption. *See generally Coffman v. Keene Corp.*, 628 A.2d at 717.Clearly this presumption works to favor the plaintiff, which comports with the overall goal of Ohiowa product liability law, and the fact the presumption stems from language of the Restatement (Second) of Torts, which Ohiowa has heavily relied on in products liability law, affirms that Ohiowa needs to adopt the heeding presumption because failing to do so would go against set public policy in the state and stray from what the legislature has previously relied on in drafting products liability laws.

2. Public Policy Justifications for the Heeding Presumption Override Any Criticism Surrounding Comment J of the Restatement (Second) of Torts

Unfortunately, this presumption has suffered from significant criticism. Specifically, courts and legal scholars have argued that the heeding presumption violates traditional products liability law because it eliminates plaintiff's burden to prove causation and the Restatement (Third) has eliminated any language in Comment j that may have supported the finding of a heeding

presumption. Carrie Daniel, *supra* at 252, 254. Contrary to the critics' beliefs, the heeding presumption complies perfectly with products liability law, specifically products liability law in Ohiowa, because it favors the plaintiff and ensures efficiency. *See* West's ALR Digest, Products Liability, Chapter IV §C(351)(2), December 2019.

Clearly, the heeding doctrine does not override traditional products liability law because of the rebuttable nature of the presumption. First and foremost, when a defendant provides an adequate warning then the presumption works in favor of the manufacturer. *See Technical Chemical Co*. 480 S.W.2d at 606.On the contrary, in the situations where no warning is provided, under the heeding presumption structure, the defendant has the opportunity to rebut the presumption that had there been an adequate warning the plaintiff would have read and heeded the warning.*See Coffman,* 628 A.2d at 717; *Cunningham v. Charles Pfizer & Co.*, 532 P. 2d 1377, 1382 (Okla. 1974); Therefore, when a defendant fails to offer any evidence to rebut the presumption the plaintiff is relieved of their duty to prove that the plaintiff would have acted different had a warning been given and the causation element is presumed. *See Coffman*, 628 A.2d at 717. However, once the defendant offers sufficient evidence to rebut the presumption, the presumption disappears and the plaintiff must offer evidence to prove causation. *See Technical Chemical Co.*, 480 S.W.2d at 606.

Thus, the heeding presumption does not eliminate the causation element of a products liability case, it simply works to ease a plaintiff's burden in situations where a manufacturer has failed to inform the user of dangerous risks associated with using their product, which is perfectly consistent with policy surrounding products liability law. Further, even though the Restatement (Third) eliminated the language from comment j of Restatement (Second), the overwhelming

amount of public policy solidifies the heeding presumption satisfies the goal of products liability law even if the language in the Restatement changes.

There are several public policy rationales courts have used to justify the use of the heeding presumption in strict liability failure-to-warn cases. *See* West's ALR Digest, *supra* at Chapter IV §C(351)(2). Some of these public policy rationales are: (1) the presumption "relieves plaintiffs from providing speculative evidence" about whether they read and heeded the warning; (2) keeps focus on the defective nature of the product, not the plaintiffs conduct; (3) "[b]alances party access to proof, since defendants typically hold most of the product evidence;" (4) "enforces manufacturers duty to warn;" and (5) "upholds the assumption that people exercise ordinary care for their own safety." Carrie Daniel, *supra*at 253.

Similar to the court's discussion in *Technical Chemical Co.*, the Texas Supreme Court affirmed in future decisions that the struggle of proving causation is a strong public policy reason Texas decided to adopt the heeding presumption. Specifically, in *General Motors Corp. v. Saenz on Behalf of Saenz*, the Texas Supreme Court stated that "proving causation in a failure-to-warn case has peculiar difficulties." 873 S.W. 2d 353, 357 (Tex. 1993). In *General Motors Corps*, the court even recognized the arguments against adoption of the heeding presumption and still justified the presumptions continued use in Texas. Id. at 357-58. Specifically, the court states that the principle argument against using the presumption is that the language from comment j to section 402A of the Restatement (Second) of Torts is not supportive of the presumption. *General Motors Corp*, 873 S.W.2d at 358. Critics argue that the language from comment j simply recognizes that "if a seller provides adequate instructions for use of his product, he cannot be liable for the buyer's failure to follow them." *Id.*

While the court recognizes this criticism of comment j is persuasive, the majority affirms that simply removing one of the bases that support the presumption does not mean the presumption should be removed. *Id*. In fact, the court explained, the real reason for support of the presumption is the problem of proving causation in failure-to-warn cases. *Id.*Further, the court acknowledged and dismissed criticism for this policy based support by explaining that critics' argument that "a presumption solution always operates to benefit the favored party and thus ignores the reality of situations" is simply not practical and the heeding presumption adopted by the state is the best way to handle the issue of causation because "it excuses plaintiffs from the necessity of making self-serving assertions that he would have followed adequate instructions (. . . .) and it assists plaintiffs in cases where the person injured has died and evidence of what he would have done is unavailable for that reason." *Id.* at 358-59.

Similar to the court's analysis in *General Motors Corp.*, the Supreme Court of New Jersey also upheld the state's adoption of the heeding presumption in *Coffman v. Keene Corp.*because the "creation of a presumption can be grounded in public policy" even if the heeding presumption is not based on "empirical evidence" and is therefore not a "natural" or "logical" presumption." 628 A.2d 710, 717 (N.J. 1993). In fact, the court explained that states have often adopted or used presumptions as a tool to "advance our goals of fostering greater products safety and enabling victims of unsafe commercial products to obtain fair redress," and the concept of strict liability itself arose from the presumption that people who use products how they are supposed to be used are usually not injured "unless the manufacturers failed in some respect in designing, manufacturing, or marketing the product." *Id.*at 597-98.

After explaining how the heeding presumption is perfectly justified by the overall goal of strict liability law, the court offered more specific public policy rationales to justify the heeding

presumption. These justifications are: (1) the heeding presumption reinforces manufacturers basic duty to warn and encourages manufacturers to produce safer products; (2) the presumption serves to lighten the plaintiffs burden of proof regarding proximate causation in products liability cases; (3) the presumption reduces the need of parties to rely on evidence that is self-serving and unreliable and instead encourages direct factual inquiries; and (4) the presumption will allow for determinations of causation that are not based on unreliable or speculative considerations. Id. 718-19. These justifications far outweigh any issues that may arise from the Restatement justification of the heeding presumption and affirm the read and heed doctrine should adopted in Ohiowa.

Similar to the justifications in *Coffman* and*Technical Chemical Corp.*, an appellate court in Arizona justified adoption of the heeding presumption in *Golonka v. General Motors Corp*. because the presumption "furthers Arizona's policy of protecting the public from defective and unreasonably dangerous products. 65 P.3d 956, 969 (Ariz. App. 2003).

Additionally, in 1991 the use of the heeding presumption in failure to warn strict liability cases was endorsed by the Council to the members of the American Law Institute's at the Institutes Sixty-Eighth Annual meeting based only on public policy grounds and not based on any logical extension of the language from comment j. *Reporter's Study: Enterprise Responsibility for Personal Injury*, I American Law Institute 255-56, 77-80 (1991).

All of these public policy justifications, from encouraging manufacturers to fulfill their duty to warn to reducing the chance of parties introducing speculative and self-serving evidence at trial, affirm that the heeding presumption should be adopted in Ohiowa, especially based on the facts of this case.

Here, even after a history of allegedly illegally marketing its e-cigarettes to children, Zuul created adhesive labels known as "skins" to cover the surface of any Zuul e-cigarette. R. at 4.

These skins allows users of the e-cigarettes to cover the product in their own custom design or a licensed character, these skins also completely covered the warning affixed on the actual e-cigarette. R. at 4. The skins provided no additional warning to make up for covering up the warning on the actual product. R. at 4. L.T.'s babysitter had chosen to cover her e-cigarette with a skin that had the popular character *Hola Gato*on it, a character that L.T. was a huge fan of. R. at 5. Similar to many eleven-year-olds, L.T. could not fight his temptation to play with the e-cigarette that housed one of his favorite characters and began play with the e-cigarette. R. at 5. Without warning, the e-cigarette exploded and left L.T. severely burned. R. at 5.

This exact situation is what the heeding presumption and goal of product liability law works to prevent. Zuul had already had a history of marketing to children and still the company continued to develop tools that would appeal to children and also covered up any sort of warning that could prevent an individual from picking up or playing with an e-cigarette.

In this case, the heeding presumption would work to encourage Zuul, and other e-cigarette manufacturers, to satisfy its duty to warn and would allow the jury to presume that had a warning been provided L.T., or any other user, would have followed it which weights in favor of L.T. The adoption of the heeding presumption furthers policy in products liability law that manufacturers should adequately warn users of potential dangers from using their products and works to protect American consumers, especially young children like L.T., from getting hurt by using products that could potentially harm them. Thus, the heeding presumption should be adopted.

Clearly, the public policy rationales used to justify use of the heeding presumption approve how such presumption is necessary to further the goal of protecting consumers in strict liability failure-to-warn disputes and the public policy provides enough support for the presumption that even if the language in comment j of the Restatement (Second) of Torts is found not to be a sound

argument, public policy still more than justifies use of such presumption. Therefore, the state of Ohio should adopt the heeding presumption in strict liability failure-to-warn claims as failing to do so would violate the well-established policy in the state that products liability should look favorably upon the consumer.

C. The Trial Court's Failure to Provide the Jury Instruction Regarding the Heeding Presumption Does Result in Prejudice

A trial court is afforded broad discretion when providing jury instructions so its decision regarding jury instructions should not be reversed unless the error complained of, in this case failure to provide a jury instruction regarding the heeding presumption, resulted in a miscarriage of justice. *See Barton Barton Protective Services, Inc. v. Faber*, 745 So.2d 968, 974 (Fla. Ct. App. 1999). Therefore, this Court should review the lower court's decision to deny jury instruction for an abuse of discretion. *Id.*The lower court correctly found that failure to adopt the heeding presumption was an abuse of discretion because public policy and the Restatement (Second) of Torts § 402A affirm that Ohiowa should adopt the heeding presumption, thus failure to provide a jury instruction on this presumption resulted in an abuse of discretion. R. 12.

However, in order to find that the lower court erred the party challenging the jury instruction, in this case the plaintiff, must show that failing to use the instruction resulted in prejudice. *McAlpine v. Rhone-Poulenc Ag Co.*, 16 P.3d 1054, 1057 (Mont. 2000). A faulty jury instruction must be reversed when (1) there is "substantial doubt whether the instructions, considered as a whole, properly guided the jury instruction," *Morrison Knudsen Corp. v Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1235 (10th Cir. 1999) (quotation omitted), and (2) "when a deficient jury instruction is prejudicial." *Colman v. B-G Maintenance Management of Colo. Inc.*, 108 F.3d 1199, 1201 (10th Cir. 1997).

The lower court found that the failure to use the heeding presumption jury instruction did not result in prejudice because the jury had "a wealth of evidence upon which to base their decision" and that the jury would not have give a different verdict if the proffered jury instruction been provided. R. at 12. However, this is not the case. Failure to inform the jury of the heeding presumption can lead the jury to be misguided because the jury is unaware that in strict liability failure-to-warn cases a plaintiff is relieved of her burden to prove causation and failing to use the heeding presumption can result in speculative evidence being brought into trial that the jury will then rely upon.

Thus, the lower court's decision should be reversed because failure to provide the heeding presumption jury instruction could have led to the jury to make an uninformed decision, resulting in prejudice. In conclusion, even though the lower court was correct in finding Ohiowa should adopt the read and head doctrine, the lower court's decision should be reversed because failing to instruct the jury that in strict liability failure-to-warn claims causation is presumed in favor of the plaintiff, the jury could have incorrectly found for the defendant and relied on self-serving or speculative evidence when coming to this decision.

CONCLUSION

For these reasons, this Court should reverse the judgment of the appellate court.

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